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PATENTS
Attorney Docket No. ST-44

IN THE UNITED STATES PATENT AND OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Appellant : Jonathan B. Orlick
Application No. : 09/555,551 Confirmation No. : 8362
Filed : August 29, 2000
For : ELECTRONIC PROGRAM GUIDE SYSTEM WITH
ADVERTISING MESSAGES IN POP-UPS
Art Unit : 2623
Examiner : Johnny Ma

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P.O. Box 1450
Alexandria, Virginia 22313-1450

APPEAL BRIEF UNDER 37 C.F.R. § 41.37

Sir:

Appellant is filing this Appeal Brief in support of his appeal from the final rejection of claims 1, 3-10, 12, 13, 15-19, 21, and 24-37 in the Office Action dated August 8, 2006. A Notice of Appeal for this case was filed on November 8, 2006. Appellant hereby petitions for a five-month extension of time under 37 C.F.R. § 1.136(a) for filing this Appeal Brief. With the extension, this Appeal Brief is due on or before June 8, 2007.

The Director is hereby authorized to charge \$2660.00 to Deposit Account No. 06-1075 (Order No. 004031-0044) in payment of the filing fee required under 37

C.F.R. § 41.20(b)(2) and the extension fee required under 37 C.F.R. § 1.17(a)(5). The Director is also hereby authorized to charge any additional fees that may be due in connection with this Appeal Brief, or credit any overpayment of the same, to Deposit Account No. 06-1075 (Order No. 004031-0044). A separate Authorization to Charge Deposit Account is enclosed for these purposes (in duplicate).

Introduction

In the Final Office Action dated August 8, 2006, claims 1, 3-10, 12, 13, 15-19, 21, 24-25, 28-32, and 35-37 were finally rejected under 35 U.S.C. § 103(a) as being obvious over Ellis et al. U.S. Publication No. 2003/0204847 (hereinafter "Ellis") in view of Zigmond et al. U.S. Patent No. 6,698,020 (hereinafter "Zigmond").

Claims 26-27 and 33-34 were finally rejected under 35 U.S.C. § 103(a) as being obvious over Ellis in view of Zigmond, and in further view of Schein U.S. Publication No. 2003/0208758 (hereinafter "Schein").

In view of the arguments and authorities set forth below, the Board should find these rejections to be in error and should reverse the Office Action.

Appendices

This Brief has the following appendices:

Claims Appendix

Appendix A: Copy of claims 1, 3-10, 12, 13, 15-19, 21, and 24-37 involved in this appeal;

Evidence Appendices

Appendix B: Copy of the Final Office Action dated August 8, 2006;

Appendix C: Copy of Ellis et al. U.S. Publication No. 2003/0204847;

Appendix D: Copy of Zigmond et al. U.S. Patent No. 6,698,020; and

Appendix E: Copy of Schein et al. U.S. Publication No. 2003/0208758.

Related Proceedings Appendix

None.

(i) Real Party in Interest

Appellant respectfully advises the Board that the real party in interest in the above-identified patent application is Starsight Telecast, Inc., a corporation organized and existing under the laws of the State of California, and having an office and place of business at 6922 Hollywood Boulevard, Los Angeles, CA 90028, which is the assignee of this application.

(ii) Related Appeals and Interferences

Appellant respectfully advises the Board that there are no other appeals or interferences known to appellant, his legal representative, or his assignee that will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(iii) Status of Claims

Claims 1, 3-10, 12, 13, 15-19, 21, and 24-37 are rejected in this application and are on appeal.

Claims 2, 11, 14, 20, and 22-23 have been canceled.

(iv) Status of Amendments

Appellant has not submitted any amendment pursuant to 37 C.F.R. § 1.116 or in reply to the August 8, 2006 final Office Action (hereinafter "Office Action"), from which this appeal is being sought.

(v) Summary of Claimed Subject Matter

Appellant's independent claims 1 and 13 are directed towards a system and method for providing a pop up window overlaid on a displayed television program having an advertising message and an informational message. A television program is displayed on a substantially full portion of a display. Television program schedule

information, informational messages, and information links that link the informational messages to the television program schedule information are stored in a television program schedule database. Advertising messages and advertisement links that link the advertising messages to the television program schedule information are stored in an advertising database. An informational message from the television program schedule database that is linked to the television program schedule information by the information link is selected. An advertisement from the advertising database that is linked to the displayed television program by the advertisement link is also selected. A pop up window is displayed overlaid on the displayed television program, where the pop up window includes the selected advertising message and the selected informational messages, where the television program is simultaneously displayed with both the informational message and the advertising message.

Support in the specification for claims 1 and 13 is found at least in the locations indicated in the following table:

Claim 1	The Specification
A television system comprising:	See, e.g., p. 2, l. 32 through p. 3, l. 3 and FIG. 2.
a television program schedule database comprising television	See, e.g., p. 6, l. 26 through p. 8, l. 2.

program schedule information, informational messages, and information links that link the informational messages to the television program schedule information;	
an advertising database comprising advertising messages and advertisement links that link the advertising messages to the television program schedule information; and	See, e.g., p. 9, l. 29 through p. 8, l. 3, and p. 14, ll. 1-3.
television equipment configured to:	See, e.g., p. 3, l. 30 through p. 4, l. 2, p. 5, l. 24 through p. 6, l. 23, and FIG. 3.
display a television program on a substantially full portion of a display monitor;	See, e.g., p. 13, ll. 16-17 and FIG. 1.
select an informational message from the television program schedule database that is linked to the television program schedule information by the information link;	See, e.g., p. 12, ll. 27-31.
select an advertising message from the advertising database that is linked to the displayed television program by the advertisement link; and	See, e.g., p. 13, ll. 7-12.
display a pop up window overlaid on the displayed television program, the pop up window including the selected advertising message and the selected informational message, wherein the television program is simultaneously displayed with both the informational message and the advertising message.	See, e.g., p. 13, ll. 16-35 and FIG. 1.
Claim 13	The Specification
A method for displaying an advertisement over a television program, the method comprising:	See, e.g., p. 13, ll. 16-35 and FIG. 1.

displaying a television program on a substantially full portion of a display monitor ;	See, e.g., p. 13, ll. 16-17 and FIG. 1.
storing television program schedule information, informational messages, and information links that link the informational messages to the television program schedule information in a television program schedule database;	See, e.g., p. 6, l. 26 through p. 8, l. 2.
storing advertising messages and advertisement links that link the advertising messages to the television program schedule information in a advertising database;	See, e.g., p. 9, l. 29 through p. 8, l. 3, and p. 14, ll. 1-3.
selecting an informational message from the television program schedule database that is linked to the television program schedule information by the information link;	See, e.g., p. 12, ll. 27-31.
selecting an advertising message from the advertising database that is linked to the displayed television program by the advertisement link; and	See, e.g., p. 13, ll. 7-12.
displaying a pop up window overlaid on the displayed television program, the pop up window including the selected advertising message and the selected informational message, wherein the television program is simultaneously displayed with both the informational message and the advertising message.	See, e.g., p. 13, ll. 16-35 and FIG. 1.

Appellant's dependent claims 26 and 33 further specify that the advertising message is related to a sponsor of the displayed television program.

Claim 26	The Specification
The television system of claim 1, wherein the selected advertising message is related to a sponsor of the displayed television program.	See, e.g., p. 13, ll. 1-5.
Claim 33	The Specification
The method of claim 13, wherein the selected advertising message is related to a sponsor of the displayed television program.	See, e.g., p. 13, ll. 1-5.

(vi) Grounds of Rejection to be Reviewed on Appeal

The following ground of rejection is to be reviewed on this appeal:

Whether claims 1, 3-10, 12, 13, 15-19, 21, 24-25, 28-32, and 35-37 are unpatentable under 35 U.S.C. § 103(a) over Ellis in view of Zigmond.

Whether claims 26-27 and 33-34 are unpatentable under 35 U.S.C. § 103(a) over Ellis in view of Zigmond, and in further view of Schein.

(vii) Argument

Rejection of Claims 1, 3-10, 12, 13, 15-19, 21, 24-25, 28-32, and 35-37 under 35 U.S.C. § 103(a) over Ellis in view of Zigmond

In the Final Office Action dated August 8, 2006, the Office Action rejected claims 1, 3-10, 12, 13, 15-19, 21, 24-25, 28-32, and 35-37 under 35 U.S.C. § 103(a) as being obvious from Ellis in view of Zigmond. Appellant

respectfully traverses this rejection and requests that it be reversed for at least the reasons set forth below.

Ellis describes an electronic program guide with a BROWSE mode that may be initiated by depressing a MODE switch. See Ellis at p. 8, ¶ 125. In the BROWSE mode, a user is "provided with the ability to scan through program schedule information for any channel, including, but not limited to, the channel being viewed, while at the same time continuing to view the TV program previously selected." Ellis at p. 8, ¶ 126. Advertisements may also be displayed with the program schedule information. See Ellis at p. 8, ¶ 127.

Zigmond refers to a method and system for inserting conventional, full-screen advertisements into video programming feeds (e.g., a television broadcast). An advertisement insertion device monitors the programming feed for a triggering event, at which time the video programming feed is interrupted, and the advertisement originally carried on the video programming feed is overwritten with a selected advertisement. See col. 4, ll. 36-52. In one embodiment of Zigmond, the advertisement may be selected according to a particular program being viewed. See col. 12, ll. 44-59.

The Office Action rejected appellant's claims based on a combination of Ellis and Zigmond, first stating that "the Ellis reference is silent as to the implementation of advertisements into the disclosed BROWSE feature," and then relying on Zigmond's full screen advertisement insertion technique to provide linked advertisements for Ellis' BROWSE overlay. Office Action p. 3. However, appellant respectfully submits that appellant's independent claims are not obvious in view of Ellis and Zigmond. Furthermore, even if these references were combined, the combined teachings would not lead one of ordinary skill to the claimed invention. In addition, the Office Action does not provide a proper and explicit reason for why one of ordinary skill in the art would make the combination of references, and has instead employed hindsight reconstruction. Therefore, the Office Action's rejection is improper and should be reversed.

Appellant's Independent Claims are not Obvious in View of the Combination of Ellis and Zigmond

"A patent may not be obtained ... if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the

art to which said subject matter pertains." 35 U.S.C.

§ 103.

Thus, to determine the obviousness or nonobviousness of the subject matter of appellant's claimed invention, "[u]nder § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. " Graham v. John Deere, 383 U.S. 1, 148 USPQ 459 (1966). Appellant respectfully submits that, regardless of the level of ordinary skill in the pertinent art, the scope and content of Ellis and Zigmond, as well as the differences between these references and appellant's claims, do not render the subject matter of applicants' independent claims obvious.

The Scope and Content of Ellis and Zigmond
do not Render the Subject Matter of
Appellant's Claimed Invention Obvious

"When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp." KSR Int'l Co. v. Teleflex Inc., 550 U.S. ___, 2007 WL 1237837, at *17 (2007) (emphasis added).

Appellant respectfully submits that the scope and content of Ellis and Zigmond are sufficiently distinct that one of ordinary skill in the art would not find it obvious to combine the teachings of the two references. In fact, appellant respectfully submits that, assuming *arguendo*, a design need or market pressure for improving Ellis' BROWSE advertisements, one of ordinary skill in art at the time the invention was made would not have identified Zigmond as leading to a possible solution. Therefore, the overall subject matter of appellants' claimed invention as a whole would not be obvious to one of ordinary skill in the art.

Appellant respectfully submits that providing advertisements in Ellis' BROWSE overlay is a completely separate problem from providing advertisements in Zigmond's full-screen, live programming feed. In particular, unlike Ellis, Zigmond provides a user with a singularly focused video feed. That is, at any given time, Zigmond provides either a television program or advertisements. Ellis, on the other hand, refers to a display with many more dimensions. Rather than providing advertisements by themselves, an advertisement can be displayed simultaneously with both a television program and television schedule information about any channel. Thus, not only does Ellis display more than just an

advertisement, content or information about multiple channels can be displayed simultaneously with the advertisement. Therefore, one of ordinary skill in the art would not expect full-screen advertisement implementations, such as that described by Zigmond, to provide a desirable advertising selection technique for Ellis' multi-dimensional BROWSE overlay. Similarly, one would not expect Zigmond to adequately address any problems associated with providing advertisements in Ellis' BROWSE overlay. Accordingly, one of ordinary skill in the art would not look to the teachings of Zigmond to use with Ellis' BROWSE mode.

Moreover, the advertisements provided by Zigmond and Ellis are technically distinct. In particular, Zigmond's full-screen advertisements may be displayed automatically, and may have characteristics typical of a live, fixed-length commercial. In contrast, Ellis displays an advertisement in a BROWSE overlay in response to a user request. Thus, the user may choose to view the BROWSE overlay, and therefore advertising, for any amount of time. Because of these significant technical differences, different advertising structures, and therefore different advertising insertion techniques, would be expected. Accordingly, one of ordinary skill in the art would not

look to advertisements coinciding with live broadcast advertisements when determining how to incorporate advertisements into Ellis' BROWSE overlay.

Thus, based on the scope and content of Ellis and Zigmond described above, combining these references in the manner suggested by the Office Action would require one of ordinary skill in the art to make two considerable leaps, neither of which would be within the knowledge or creativity of one of ordinary skill in the art at the time of the invention. First, even with their significant technical and functional differences, one would have to see a benefit in using a full-screen advertising implementation for providing advertisements in not just an electronic program guide, but in an overlay. Second, one would have to see a benefit in utilizing Zigmond's advertising technique, including the alternative embodiment that provides advertisements related to a program on a currently tuned channel, even in systems that concurrently display content or information about channels other than the currently tuned channel (e.g., program information for another channel), such as in Ellis' BROWSE overlay. Because one of ordinary skill in the art would not make both of these leaps, appellant respectfully submits that one of ordinary skill in the art would not combine Ellis

and Zigmond in the manner suggested by the Office Action. Therefore, the overall subject matter of appellants' claimed invention is not obvious.

Accordingly, appellants respectfully submit that the subject matter of appellants' claims are not obvious in light of the scope and content of Ellis and Zigmond.

The Differences Between Appellant's Claims
and the References Show that Appellant's
Claimed Invention is Nonobvious

"In determining the differences between the prior art and the claims, the question under 35 U.S.C. 103 is not whether the differences themselves would have been obvious, but whether the claimed invention as a whole would have been obvious." Stratoflex, Inc. v. Aeroquip Corp., 713 F.2d 782, 218, USPQ 698 (Fed. Cir. 1983). See also *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981). ("The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference ... Rather, the test is what the combined teachings of the reference would have suggested to those of ordinary skill in the art.")

Appellant respectfully submits that the Office Action has based its obviousness rejection on only the particular differences between appellant's claims and the teachings of the Ellis and Zigmond, rather than on overall

subject matter. If the combined teachings of Ellis and Zigmond are properly considered, appellant respectfully submits that one of ordinary skill in the art would not be led to appellant's claimed invention. In fact, assuming *arguendo* that one would combine Ellis and Zigmond, the teachings of these references suggest a combination entirely different from appellant's claimed invention. Thus, appellant's claims are not obvious under 35 U.S.C. § 103, because the subject matter of appellant's claimed invention, as a whole, is not obvious.

Appellant respectfully submits that the interrelated teachings of Ellis and Zigmond would at best lead one of ordinary skill to provide a system with a BROWSE overlay, as taught by Ellis, and targeted advertisements during regularly scheduled breaks, as taught by Zigmond. In particular, Ellis teaches BROWSE advertisements as well as conventional broadcast advertisements. Zigmond teaches inserting targeted advertisements in place of conventional broadcast advertisements. Therefore, based on these teachings, one of ordinary skill would use Zigmond's targeted advertisements in place of the untargeted broadcast advertisements shown as interstitials in programs broadcast in a system that include a BROWSE-type overlay.

In addition, Zigmond's teachings explicitly support this alternate combination. Zigmond shows that an electronic program guide can be used to provide the trigger that causes an advertisement to be inserted into the live programming feed. See Zigmond at col. 4, ll. 43-45. That is, at an appropriate time in a television broadcast, the electronic program guide can cause a stored commercial to be shown in place of the commercial in the live broadcast. Accordingly, based on this explicit teaching of Zigmond, one would combine Ellis and Zigmond by using Ellis' electronic program guide to trigger the insertion of an advertisement in place of the live feed, not by modifying the BROWSE overlay advertisements of Ellis.

As shown above, if Ellis and Zigmond were combined by one of ordinary skill, the combination would provide a BROWSE overlay, possibly with advertisements, on top of either a television program or a targeted full screen advertisement. Thus, appellant respectfully submits that the combination of Ellis and Zigmond fails to show appellants' claimed feature of "displaying a pop up window overlaid on the displayed television program, the pop up window including the selected advertising message and the selected informational message, wherein the television program is simultaneously displayed with both the

informational message and the advertising message," and where the selected advertising message is linked to the displayed program.

Therefore, at least because the interrelated teachings of Ellis and Zigmond do not lead one to appellant's claimed invention, appellant respectfully submits that the subject matter of appellant's claimed invention, as a whole, is not obvious from the teachings of these references. For at least this reason, appellant respectfully submits that the rejection of appellants' independent claims are improper and should be reversed.

The Office Action Does Not Provide a Proper and Explicit Reason for Why One of Ordinary Skill Would Combine Ellis and Zigmond

To reject an application based on a combination of references, the Office Action should "identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does," and should make the analysis explicit. KSR at *14-15.

Instead of providing such a reason, the Office Action attempts to combine Ellis' overlay advertisements

with Zigmond's ad insertion technique, stating that

"it would be obvious to one of ordinary skill in the art at the time the invention was made to modify the Ellis ... advertisements with Zigmond ... for the purpose of generating increased advertisement revenue for program providers and providing advertisements that are more likely to appeal to the user and thus increase advertising effectiveness for the advertisers." Office Action at p. 6.

In an attempt to formulate an explicit analysis, the Office Action contends that Zigmond teaches "the desirability of targeting advertisements to viewers that are more likely to be receptive to the commercial message (Zigmond 1:23-43; 2:10-15)," and that this would lead one of ordinary skill in the art to combine Ellis and Zigmond. See Office Action at p. 3. Appellant respectfully disagrees. Appellant respectfully submits that Zigmond's general ideas of providing "increased advertising revenues" and "advertisements that are more likely to appeal to the user" are not reasons that would lead one of ordinary skill in the art to combine Ellis and Zigmond.

Zigmond refers to these alleged teachings merely to set up a problem within the realm of conventional, full-screen advertisements in television broadcasts. In particular, Zigmond refers to a problem with a previous method of providing targeted advertisements, which calls for inserting local advertisements into a national

broadcast to target geographic regions. Thus, inserting advertisements at the household level to target individuals, as described by Zigmond, may provide "increased revenues" and "increased advertising effectiveness" when compared to its prior art - namely, systems where local broadcasters insert advertisements into national broadcasts. Therefore, in referring to these ideas, Zigmond is merely giving reasons as to why Zigmond is an improvement over its own prior art. However, the general ideas of "increased revenues" and "increased advertising effectiveness" do not provide any insight into ways that another reference, such as Ellis' system, could be modified to achieve a similar improvement.

Moreover, as described above, the display provided by Ellis has many more dimensions and is completely different in scope than that provide by Zigmond. Thus, the alleged benefits that Zigmond provides over prior art conventional television systems cannot be assumed to translate to Ellis' electronic program guide. Therefore, the Office Action has attempted to provide motivation for the combination of Ellis and Zigmond using broad, conclusory statements instead of concrete facts. See *In re Kahn*, 441 F. 3d 997, 988 (CA Fed. 2006) ("[R]ejections on obviousness grounds cannot be sustained by mere conclusory

statements; instead, there must be some rational underpinning to support the legal conclusion of obviousness").

Accordingly, appellant respectfully submits that the Office Action has not provided an explicit, convincing reason as to why one of ordinary skill would attempt to combine Ellis and Zigmond in the manner suggested by the Office Action.

The Office Action has Employed Hindsight
Reconstruction in Combining the References

Appellant has shown that one of ordinary skill in the art would not be led to combine Ellis and Zigmond in the manner suggested by the Office Action, and that the Office Action has not provided a convincing reason for why one would. Therefore, appellant respectfully submits that the Office Action has employed hindsight reconstruction in combining these references.

With the knowledge of appellant's novel system for selecting advertisements and informational messages for simultaneous display in a television pop up overlay, particular features of the prior art were identified for use in rejecting appellant's claimed invention. Specifically, the Office Action has looked to an unrelated reference, Zigmond, for particular elements of appellant's

claims that are not present in known television overlay systems. Thus, but for appellant's own specification, which provides an improved technique for selecting content for display in a pop up overlay, one would not be motivated to combine the teachings of Ellis and Zigmond. Therefore, the combination of Ellis and Zigmond could only have been made using hindsight reconstruction, which is impermissible as a matter of law. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). ("One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention.").

For this additional reason, appellant respectfully submits that the Office Action's rejections to appellant's claimed invention are invalid and should be reversed.

Conclusion

For at least these reasons, appellant respectfully submits that the Board should reverse the obviousness rejection of independent claims 1 and 13 under 35 U.S.C. § 103(a). Appellant respectfully submits that the Board should also reverse the obviousness rejection of claims 3-10, 12, 15-19, 21, 24-25, 28-32, and 35-37 at

least because they depend variously from independent claims 1 and 13.

Rejection of Claims 26-27 and 33-34 under 35 U.S.C. § 103(a) over Ellis in view of Zigmond, and in further view of Schein

Claims 26 and 33 further specify that the advertising message is related to a sponsor of the displayed television program.

The Office Action rejected claims 26-27 and 33-34 under 35 U.S.C. § 103(a) as being unpatentable over Ellis in view of Zigmond, and in further view of Schein. In particular, the Office Action combines the panel advertisement of FIGS. 12A-12B or 17A-17C in Schein with the combination of Ellis and Zigmond to reject appellant's claims. However, appellant respectfully submits that, when considering Schein in its entirety, Schein teaches away from such a combination.

Schein refers to an interactive television program guide system having multiple program guide features and embodiments. Some of Schein's program guide screens (e.g., FIGS. 12A-12B or 17A-17C) contain advertisements related to program sponsors, while other program guide screens (e.g., FIGS. 13A-13C) only contain links to other program guide screens that may provide advertisements. Some of Schein's program guide screens are overlaid on a

portion of the display screen (e.g., FIGS. 13A-13C), while other program screens cover the entire display screen (e.g., 12A-12B or 17A-17C).

Despite providing both full-screen program guide screens and overlaid program guide screens, Schein does not put advertising messages related to a sponsor of a television program in overlaid program guide screens. Instead, Schein limits these advertisements to the full-screen program guide screens. The overlaid program guide screens only contain links to the full-screen program guide screens which then in turn contain the advertisements. Thus, in Schein, if a user is presented with an overlaid program guide screen and wishes to access advertisements related to a sponsor of a television program, the user must select a link to a full-screen program guide screen, the only program guide screens in which advertisements are provided. Accordingly, Schein effectively teaches away from providing advertisements related to program sponsors in an overlay over a displayed television program.

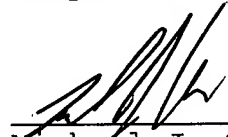
For at least this additional reason, appellant respectfully submits that the Board should reverse the obviousness rejection of dependent claims 26 and 33 under 35 U.S.C. § 103(a). Appellant respectfully submits that the Board should also reverse the obviousness rejection of

dependent claims 27 and 34 at least because they depend from claims 26 and 33, respectively.

Conclusion

For the reasons set forth above, appellant respectfully submits that claims 1, 3-10, 12, 13, 15-19, 21, and 24-37 are in condition for allowance. The Office Action's rejections of these claims should be reversed.

Respectfully submitted,



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(viii) Claims Appendix

CLAIMS APPENDIX A

CLAIMS 1, 3-10, 12, 13, 15-19, 21, and 24-37 ON APPEAL

1. A television system comprising:

a television program schedule database comprising television program schedule information, informational messages, and information links that link the informational messages to the television program schedule information;

an advertising database comprising advertising messages and advertisement links that link the advertising messages to the television program schedule information; and

television equipment configured to:

display a television program on a substantially full portion of a display monitor;

select an informational message from the television program schedule database that is linked to the television program schedule information by the information link;

select an advertising message from the advertising database that is linked to the displayed television program by the advertisement link; and

display a pop up window overlaid on the displayed television program, the pop up window including the selected advertising message and the selected

informational message , wherein the television program is simultaneously displayed with both the informational message and the advertising message.

3. The television system of claim 1, wherein the selected informational message relates to the displayed television program .

4. The television system of claim 1, wherein the selected informational message relates to later programming on a channel of the displayed television program.

5. The television system of claim 1, wherein the selected informational message relates to current programming on a channel of the displayed television program.

6. The television system of claim 1, further comprising displaying a composite of an EPG and an advertising message overlaid on the displayed television program.

7. The television system of claim 6, further comprising displaying an EPG overlaid on the displayed television program.

8. The television system of claim 6, further comprising storing EPG data including at least one stored background color value.

9. The television system of claim 8, further comprising using the stored background color value to display the EPG alone.

10. The television system of claim 8, further comprising substituting a transparent value for the stored background color value to display the composite.

12. The television system of claim 1, in which the selected advertising message is about a product or service.

13. A method for displaying an advertisement over a television program, the method comprising:

displaying a television program on a substantially full portion of a display monitor ;

storing television program schedule information, informational messages, and information links that link the informational messages to the television program schedule information in a television program schedule database;

storing advertising messages and advertisement links that link the advertising messages to the television program schedule information in a advertising database;

selecting an informational message from the television program schedule database that is linked to the television program schedule information by the information link;

selecting an advertising message from the advertising database that is linked to the displayed television program by the advertisement link; and

displaying a pop up window overlaid on the displayed television program, the pop up window including the selected advertising message and the selected informational message, wherein the television program is simultaneously displayed with both the informational message and the advertising message.

15. The method of claim 13, wherein the selected informational message relates to the displayed television program .

16. The method of claim 13, wherein the selected informational message relates to later programming on a channel of the displayed television program.

17. The method of claim 13, wherein the selected informational message relates to current programming on a channel of the displayed television program.

18. The method of claim 13, further comprising displaying a composite of an EPG and an advertising message overlaid on the displayed television program.

19. The method of claim 18, further comprising displaying an EPG overlaid on the displayed television program.

21. The method of claim 13, in which the selected advertising message is about a product or service.

24. The television system of claim 1, wherein the pop up window further includes a television program title simultaneously displayed with both the informational message and the advertising message.

25. The television system of claim 1, wherein the selected advertising message is about an upcoming television program or event.

26. The television system of claim 1, wherein the selected advertising message is related to a sponsor of the displayed television program.

27. The television system of claim 26, wherein the selected advertising message promotes products and services of the sponsor.

28. The television system of claim 1, wherein the selected advertising message is related to a subject of the displayed television program.

29. The television system of claim 1, wherein a different advertising message is selected each time the pop up window is displayed.

30. The television system of claim 1, wherein a different advertising message is selected and displayed after a predetermined time.

31. The method of claim 13, wherein the pop up window further includes a television program title simultaneously displayed with both the informational message and the advertising message.

32. The method of claim 13, wherein the selected advertising message is about an upcoming television program or event.

33. The method of claim 13, wherein the selected advertising message is related to a sponsor of the displayed television program.

34. The method of claim 33, wherein the selected advertising message promotes products and services of the sponsor.

35. The method of claim 13, wherein the selected advertising message is related to a subject of the displayed television program.

36. The method of claim 13, wherein a different advertising message is selected each time the pop up window is displayed.

37. The method of claim 13, wherein a different advertising message is selected and displayed after a predetermined time.

(ix) Evidence Appendix

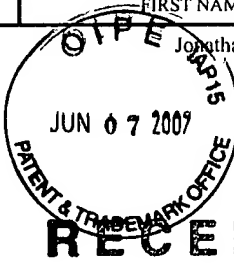
EVIDENCE APPENDIX B
COPY OF THE FINAL OFFICE ACTION DATED August 8, 2006



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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/555,551	08/29/2000	Jonathan B. Orlick	ST/044	8362
7590		08/08/2006		
Alexander Shvarts Fish & Neave 1251 Avenue of the Americas New York, NY 10020-1105				
		EXAMINER MA, JOHNNY		
		ART UNIT 2623		
		PAPER NUMBER		



DATE MAILED: 08/08/2006

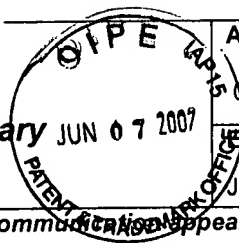
AUG 11 2006

ROPES & GRAY LLP, PATENT DEPT.
REFERRED TO JMG/MJC
NOTED BY _____

Please find below and/or attached an Office communication concerning this application or proceeding.

File No.: ST/044
Action Desc: 8A Response due. Appeal Brief
Due Date: November 8, 2006
By: JLB

File No.: ST/044
Action Desc: Notice of Appeal
Due Date: February 8, 2007
By: JLB

Office Action Summary

Application No.

09/555,551

Examiner

Johnny Ma

Applicant(s)

ORLICK, JONATHAN B.

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 17 May 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,3-10,12,13,15-19,21 and 24-37 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,3-10,12,13,15-19,21 and 24-37 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Response to Arguments

1. Applicant's arguments filed 5/17/2006 have been fully considered but they are not persuasive.

Applicant traverses the Examiner's rejections of claims 1 and 13 as being unpatentable over Ellis in view of Zigmond. Applicant first argues that the examiner has failed to provide a motivation to combine the references because "increased revenue is not the 'objective teaching' necessary to provide motivation to combine Ellis and Zigmond" (Remarks, pg. 4); "the Examiner has not provided any indication why one of ordinary skill in the art would be motivated to combine Ellis's system and method for displaying a graphic overlay as part of an electronic program guide that may include advertisements with Zigmond's system and method for selecting and inserting advertisements into video programming" (Remarks, pg. 5), and because "[t]hese two references refer to completely different and unrelated advertising techniques" (Remarks, pg. 5). The examiner respectfully disagrees. As noted by Applicant, the previous Office Action stated:

"[I]t would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the Ellis et al. overlay including advertisements with the Zigmond et al. ad database and ad links for the purpose of generating increased advertisement revenue for program providers and providing advertisements that are more likely to appeal to the user and thus increase advertising effectiveness for the advertisers."

With regard to Applicant's argument related to increased revenue, the Examiner respectfully submits that Applicant has not addressed the motivation to combine in its entirety. Specifically,

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it appears that Applicant does not traverse “providing advertisements that are more likely to appeal to the user.” Furthermore, the Zigmond et al. reference specifically teaches the desirability of targeting advertisements to viewers that are more likely to be receptive to the commercial message (Zigmond 1:23-43; 2:10-15). The examiner respectfully submits that such a desirability to use targeted advertisements satisfies the “objective teaching” necessary to provide motivation to combine the references. The Zigmond et al. teaching of the desirability of targeted advertisements also provides a motivation to modify the Ellis displaying a graphic overlay with the Zigmond system and method for selecting advertisements for insertion. The Ellis reference is silent as to the implementation of advertisements into the disclosed BROWSE feature and one of ordinary skill in the art at the time the invention was made would have motivated to rely on the well known use of targeted advertisements, as taught by Zigmond, for implementing the Ellis system. Regarding Applicant’s argument that the Ellis and Zigmond references refer to completely different and unrelated advertising techniques, it is noted that both the Ellis et al. and Zigmond et al. references teach systems for presenting advertisements to system users wherein the Zigmond et al. reference teaches a specific method of presentation, targeted advertising. The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on

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obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In the instant case, this obviousness rejection only takes into account knowledge within the level of ordinary skill at the time the invention was made as evidenced by the Zigmond teaching of the desirability of targeted advertisements as discussed above.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 1, 3-7, 12-13, 15-19, 21, 28-30, and 35-37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ellis et al. (US 2003/0204847 A1 of record) in further view of Zigmond et al. (US 6,698,020 B1 of record).

As to claim 1, note the Ellis et al. reference that discloses an electronic television program guide schedule system and method with remote product ordering. The claimed "a television program schedule database" is met by "[t]he microcontroller 16 uses the received program schedule information to build a database by storing the data in appropriately organized records in dynamic random access memory (DRAM) 18" (Ellis [0097]). The claimed "comprising television program schedule information, informational messages, and information

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links that link the informational messages to the television program schedule information” is met by “[t]he schedule information [...] includes the name of the program and program start/stop time” (Ellis [0129]) and “the microcontroller first searches the program schedule database in, for example, the DRAM 18 to retrieve the programming information for the currently tuned channel 52 corresponding to the current time...” (Ellis [0119]) and in the BROWSE mode “a graphic overlay 111 is generated, as in the FLIP mode, with program schedule information for the currently tuned channel 112...” (Ellis 0126)) wherein it is inherent that the television program schedule information and informational messages be linked in order for them to be properly displayed to the user. Note, the Ellis et al. reference discloses that the BROWSE feature may incorporate advertisements (Ellis [0127]). However, the Ellis et al. reference is silent as to how the advertisements are incorporated into the BROWSE feature. Now note the Zigmond et al. reference that discloses a method for intelligent ad insertion. The claimed “an advertising database comprising advertising messages and advertisement links that link the advertising messages to the television program schedule information” is met by “advertisement source 62 may be a local repository having stored therein a plurality of advertisements” (Zigmond 8:3-5) wherein “the ad selection criteria 83 [links] may select specific advertisements according to a particular program being viewed” (Zigmond 12:49-51). The claimed “select an advertising message from the advertising database that is linked to the displayed television program by the advertisement link” is also met by “the ad selection criteria 83 [links] may select specific advertisements according to a particular program being viewed” (Zigmond 12:49-51).

Therefore, the examiner submits that it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the Ellis et al. overlay including advertisements

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with the Zigmond et al. ad database and ad links for the purpose of generating increased advertisement revenue for program providers and providing advertisements that are more likely to appeal to the user and thus increase advertising effectiveness for the advertisers. The claimed “and television equipment configured to: display a television program on a substantially full portion of a display monitor” is met by “[i]n the BROWSE mode, the user is provided with the ability to scan through program schedule information for any channel, including, but not limited to, the channel being viewed, while at the same time continuing to view the TV program previously selected” (Ellis [0126]). The claimed “select an informational message from the television program schedule database that is linked to the television program schedule information by the information link” is met by the selecting of the corresponding program information (informational message) from the television program schedule database (Ellis [0119,0126-0129]). The claimed “display a pop up window overlaid on the displayed television program” is met by the display of a graphic overlay while at the same time continuing to view the TV program previously selected (Ellis [0126]). The claimed “the pop up window including the selected advertising message and the selected informational message” is met by the Ellis et al. and Zigmond et al. combination as discussed above teaching an overlay (pop up window) including advertisements. The claimed “wherein the television program is simultaneously displayed with both the informational message and the advertising message” is met by displaying an overview while at the same time continuing to view the TV program previously selected” (Ellis [0126]).

As to claim 3, the claimed “wherein the selected informational message relates to the displayed television program” is met by “a graphic overlay 111 is generated, as in the FLIP mode, with program schedule information for the currently tuned channel 112” (Ellis [0126]).

As to claim 4, the claimed “wherein the selected informational message relates to later programming on a channel of the displayed television program” is met by “[i]n order to view programming information for later or earlier times, the user employs the left and right direction arrows 43B. As a consequence, the system will display future program schedule information for the particular channel previously selected by the up and down direction arrows, whether it is the channel currently being viewed or any other available channel” (Ellis [0129]).

As to claim 5, please see rejection of claim 3.

As to claim 6, the claimed “further comprising displaying a composite of an EPG and an advertising message overlaid on the displayed television program” is met by the Ellis et al. and Zigmond et al. combination as discussed in the rejection of claim 1.

As to claim 7, the claimed “further comprising displaying an EPG overlaid on the displayed television program” is met by “the user is provided with the ability to scan through program schedule information for any channel, including, but not limited to, the channel being viewed, while at the same time continuing to view the TV program previously selected” (Ellis [0126]).

As to claim 12, the claimed “in which the selected advertising message is about a product or service” is met by the Ellis et al. and Zigmond et al. combination as discussed in the rejection of claim 1 wherein ads may comprise goods or service (Zigmond 14:25-26).

As to claims 13, 15-19, and 21, please see rejections of claims 1, 3-7, and 12 respectively.

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As to claim 28, please see rejection of claim 1.

As to claim 29, the claimed “wherein a different advertising message is selected each time the pop up window is displayed.” The Ellis et al. reference does not specifically disclose the display of a different advertising message each time the pop up window is displayed. Nevertheless, the examiner gives Official Notice that it is notoriously well known in the art to display different advertisements to users for the purpose of maximizing advertising revenue and to increase the likelihood that a user will view and advertised product or service of interest to the viewer and for the further purpose of providing variety to a user. Therefore, the examiner submits that it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the Ellis et al. display electronic program guide overlay with advertisements accordingly for the above stated advantages.

As to claim 30, the claimed “wherein a different advertising message is selected and displayed after a predetermined time.” The Ellis et al. reference does not specifically disclose the display of a different advertising message after a predetermined time. Nevertheless, the examiner gives Official Notice that it is notoriously well known in the art to replace advertisements for the purpose of maximizing advertising revenue and to increase the likelihood that a user will view and advertised product or service of interest to the viewer and for the further purpose of providing variety to a user. Therefore, the examiner submits that it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the Ellis et al. display electronic program guide overlay with advertisements accordingly for the above stated advantages.

As to claim 35-37, please see rejection of claim 28-30 respectively.

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4. Claims 8 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ellis et al. (US 2003/0204847 A1 of record) in further view of Zigmond et al. (US 6,698,020 B1 of record) and Alten et al. (US 5,635,978 of record).

As to claim 8, note the Ellis et al. and Zigmond et al. combination distributing non-video program guide and advertising data to set top boxes where it is stored. However, the Ellis et al. reference is silent as to the storage of EPG data including background color. Now note the Alten reference that discloses the storage of bitmaps in the system for use as “mood background” viewing (Alten 11:34-38). Alten specifically discloses the use of a “nighttime view” (Alten 11:42) and (Fig. 5c) as an example. Therefore, the examiner submits that it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the Ellis et al. EPG display with the Alten et al. background coloring for the purpose of easing the monotony of viewing program listings.

As to claim 9, please see rejection of claim 8.

5. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ellis et al. (US 2003/0204847 A1 of record) in further view of Zigmond et al. (US 6,698,020 B1 of record), Alten et al. (US 5,635,978 of record), and Marshall et al. (US 5,828,420 of record).

As to claim 10, note the Ellis et al. and Alten et al. combination teaches an EPG guide including stored background color values. However, the Ellis et al. and Alten et al. combination is silent as to the use of a transparent value for the background color. Now note the Marshall et al. reference that discloses an EPG that uses a transparent value for the background of the EPG (Fig. 9). Therefore, the examiner submits that it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the Ellis et al. and Alten et al.

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combination with the Marshall et al. transparent background color for the purpose of maintaining the full screen view of the television program while viewing the program listing for the viewer's entertainment.

6. Claims 25 and 32 rejected under 35 U.S.C. 103(a) as being unpatentable over Ellis et al. (US 2003/0204847 A1 of record) in further view of Zigmond et al. (US 6,698,020 B1 of record) and Macrae et al. (US 2003/0208756 A1 of record).

As to claim 25, the claimed "wherein the selected advertising message is about an upcoming television program or event." Note, the Ellis et al. reference discloses advertising messages (Ellis [0127]). However, the Ellis et al. reference is silent as to advertising messages about an upcoming television program or event. Now note the Macrae et al. reference that discloses a method and system for displaying targeted advertisements in an electronic program guide. The claimed "wherein the selected advertising message is about an upcoming television program or event" is met by advertisements displaying information about a future-scheduled television program" (Macrae [0214]). Therefore, the examiner submits that it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the Ellis et al. advertisements with the Macrae et al. future-programming advertisements for the purpose of promoting certain programs to a user and allowing a user to easily instruct the EPG to record the future-scheduled program (Macrae [0214]).

As to claim 32, please see rejection of claim 25.

7. Claims 26-27 and 33-34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ellis et al. (US 2003/0204847 A1 of record) in further view of Zigmond et al. (US 6,698,020 B1 of record) and Schein et al. (US 2003/0208758 A1 of record).

As to claims 26 and 27, the claimed “wherein the selected advertising message is related to a sponsor of the displayed television program” and “wherein the selected advertising message promotes products and services of the sponsor.” Note the Ellis et al. reference discloses an overlay with advertisements. However, the Ellis et al. reference does not specifically disclose advertising messages relating to a television program sponsor. Now note the Schein et al. reference that discloses a method and system for displaying panel advertisements in an electronic program guide wherein advertisement messages may advertise programs or products from program sponsors, etc. (Schein et al. [0081]). Therefore, the examiner submits that it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the Knudson et al. electronic program guide advertisements with the Schein et al. program sponsor advertisements for the purpose of providing a program sponsor with an additional benefit of increasing exposure of viewers to its’ products/services and an additional means revenue.

As to claims 33 and 34, please see the rejections of claim 26 and 27.

Conclusion

8. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event,

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however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Johnny Ma whose telephone number is (571) 272-7351. The examiner can normally be reached on 8:00 am - 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Chris Kelley can be reached on (571) 272-7331. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

jm


CHRIS KELLEY
SUPERVISORY PATENT EXAMINER
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EVIDENCE APPENDIX C

COPY OF ELLIS ET AL. U.S. PUBLICATION NO. 2003/0204847

(x) Related Proceedings Appendix

None.